

NOX F E 2 04-11-96

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

FCC 96-99

|                                    |   |                     |
|------------------------------------|---|---------------------|
| In the Matter of                   | ) |                     |
|                                    | ) |                     |
| Implementation of Section 302 of   | ) | CS Docket No. 96-46 |
| the Telecommunications Act of 1996 | ) |                     |
|                                    | ) |                     |
| Open Video Systems                 | ) |                     |

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| In the Matter of                  | ) |                                   |
|                                   | ) | CC Docket No. 87-266 (Terminated) |
| Telephone Company-Cable           | ) |                                   |
| Television Cross-Ownership Rules, | ) |                                   |
| Sections 63.54-63.58              | ) |                                   |

**REPORT AND ORDER AND  
NOTICE OF PROPOSED RULEMAKING**

Adopted: March 11, 1996

Released: March 11, 1996

By the Commission:

Comment Date: April 1, 1996

Reply Comment Date: April 11, 1996

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## **I. INTRODUCTION**

1. On February 8, 1996, the Telecommunications Act of 1996 (the "1996 Act") was signed into law.<sup>1</sup> Among other things, the 1996 Act repeals the telephone-cable cross-ownership restriction imposed by the Cable Communications Policy Act of 1984 ("1984 Cable Act"),<sup>2</sup> which prohibited telephone companies from providing video programming directly to

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, approved February 8, 1996.

<sup>2</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b) (codified at 47 U.S.C. § 533(b)).

subscribers in their telephone service areas.<sup>3</sup> In addition, the 1996 Act repeals the Commission's "video dialtone" rules and policies, which were established to permit telephone companies to participate in the video marketplace in a manner that was consistent with the statutory telephone-cable cross-ownership ban.<sup>4</sup> Under video dialtone, telephone companies could provide a common carrier video transmission service for programming provided by others, but, consistent with the statutory ban, were generally prohibited from providing any programming themselves.<sup>5</sup> The Fourth and Ninth Circuits, however, found the cross-ownership ban violated the First Amendment and the Commission was enjoined from enforcing it against virtually all local exchange carriers.<sup>6</sup>

2. In repealing the telephone-cable cross-ownership restriction and video dialtone rules, the 1996 Act has adopted a different regulatory approach. Instead of preventing telephone companies from competing with cable operators in their local service territories, the 1996 Act offers telephone companies several options for entering and competing in the video marketplace, in keeping with the 1996 Act's general goal of "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>7</sup> As the

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<sup>3</sup> 1996 Act § 302(b)(1).

<sup>4</sup> See 1996 Act § 302(b)(3); *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry in CC Docket No. 87-266*, 7 FCC Rcd 300 (1991); *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 5069, *aff'd*, *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994); *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 (1992), *aff'd*, *Memorandum Opinion and Order on Reconsideration and Third Notice of Proposed Rulemaking*, 10 FCC Rcd 244 (1994), *appeal pending sub nom., Mankato Citizens Tel. Co. v. FCC*, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992); *Third Report and Order*, CC Docket No. 87-266, 60 FR 31924 (June 19, 1995); *Fourth Report and Order*, CC Docket No. 87-266, FCC 95-357 (released August 14, 1995).

However, the 1996 Act also states that its repeal of the video dialtone rules and regulations does not require the termination of any video dialtone system that the Commission has approved prior to the enactment date of the 1996 Act. 1996 Act § 302(b)(3).

<sup>5</sup> See *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5820 (1992).

<sup>6</sup> See *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 42 F.3d 181 (4th Cir. 1994), *rehearing denied* (January 18, 1995), *cert. granted*, 115 S.Ct. 2608 (June 26, 1995), *remanded* (February 27, 1996); *U S West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1995); *United States Tel. Ass'n v. United States*, No. 1-94CV01961 (D. D.C. Feb. 14, 1995).

<sup>7</sup> See Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 113 (February 1, 1996) ("Conference Report").

Conference Report states:

Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs.<sup>8</sup>

Later, the Conference Report again notes that "the conferees recognize that telephone companies need to be able to choose from among multiple video entry options to encourage entry," and therefore systems under this section should be "allowed to tailor services to meet the unique competitive and consumer needs of individual markets."<sup>9</sup> Thus, the 1996 Act gives telephone companies broad flexibility in determining how to enter the video marketplace in order to encourage telephone company entry and spur competition and new investment. Ultimately, the 1996 Act recognizes that vigorously competitive markets, not regulation, are the best way to serve consumers' interests.

3. The general regulatory treatment for video programming services provided by telephone companies is set forth in Section 302 of the 1996 Act,<sup>10</sup> which establishes a new Part V (Sections 651-653) of Title VI of the Communications Act of 1934 (the "Communications Act").<sup>11</sup> The specific entry options for telephone companies entering the video programming marketplace are set forth in Section 651, which provides that common carriers may: (1) provide video programming to subscribers through radio communication under Title III of the Communications Act;<sup>12</sup> (2) provide transmission of video programming on a common carrier basis under Title II of the Communications Act;<sup>13</sup> (3) provide video programming as a cable system under Title VI of the Communications Act;<sup>14</sup> or (4) provide video programming by means of an "open video system" under new Section 653 of the Communications Act.<sup>15</sup> The 1996 Act also provides that, to the extent permitted by Commission regulation, a cable operator or any other person may provide video programming

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<sup>8</sup> *Id.* at 172.

<sup>9</sup> *Id.* at 177.

<sup>10</sup> A complete copy of Section 302 of the 1996 Act is attached as Appendix A.

<sup>11</sup> Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

<sup>12</sup> *Id.* § 651(a)(1).

<sup>13</sup> *Id.* § 651(a)(2).

<sup>14</sup> *Id.* § 651(a)(3).

<sup>15</sup> *Id.* § 651(a)(3)-(4).

through an open video system.<sup>16</sup>

4. Section 653's open video system option entails an entirely new framework for entering the video marketplace. In the Notice of Proposed Rulemaking ("NPRM") portion of this item, we seek comment on how the Commission should implement the requirements of the open video system framework in a way that will promote Congress' goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice.<sup>17</sup> In addition to these goals, by prohibiting open video system operators from discriminating among video programming providers with regard to carriage, and requiring them to provide just, reasonable and non-discriminatory rates, terms and conditions for carriage,<sup>18</sup> we believe that Congress also signalled its intent that programming would be offered on open video systems by entities other than the open video system operator. In setting forth specific issues in the NPRM, we do not mean to imply that we will find it necessary to adopt rules addressing each of the issues raised. Rather, these questions are designed to develop a record that will enable us to determine what rules, if any, the Commission needs to adopt to effectuate the statute's requirements.

5. Generally, Section 653 provides that, if a telephone company certifies that it complies with certain non-discrimination and other requirements established by the Commission, its open video system will not be subject to regulation under Title II and will be entitled to reduced regulation under Title VI.<sup>19</sup> The Commission must approve or disapprove any open video system certification request within ten days of receipt.<sup>20</sup> An open video system operator's certification request must state that it complies with the requirements in subsection 653(b), which generally: (1) prohibit the operator from discriminating among video programmers regarding carriage on its system; (2) require the operator to establish rates, terms and conditions of carriage that are just, reasonable and not unjustly or unreasonably discriminatory; (3) prohibit the operator or its affiliate, if carriage demand exceeds capacity, from selecting the video programming on more than one-third of its activated channels; (4) permit the operator to use channel sharing arrangements; (5) extend the Commission's sports exclusivity, network non-duplication and syndicated exclusivity regulations to open video systems; and (6) prohibit the operator from discriminating with regard to information provided to subscribers for the purpose of selecting programming. We note that the legislative history clearly indicates that the Commission is not to impose "Title II-like

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<sup>16</sup> *Id.* § 653(a)(1).

<sup>17</sup> *See* Conference Report at 172, 177-78.

<sup>18</sup> Communications Act § 653(b)(1)(A)-(B).

<sup>19</sup> *Id.* § 653(a)(1), (c).

<sup>20</sup> *Id.* § 653(a)(1).

regulation" under the authority of Section 653.<sup>21</sup> Subsection 653(b)(1) directs the Commission to take all actions necessary (including any reconsideration) to prescribe regulations implementing these requirements within six months of the 1996 Act's enactment. Similarly, subsection 653(c)(2)(A) directs the Commission to take all actions necessary (including any reconsideration) to prescribe regulations applying, to the extent possible, Title VI "must-carry" and public, educational and governmental ("PEG") obligations, and Title III retransmission consent obligations, to open video systems operators.

6. If the Commission approves an open video system operator's certification, the operator will qualify for the reduced regulatory burdens of subsection 653(c). Some of the Title VI provisions that would not apply to open video systems under subsection 653(c) include: (1) Section 612 -- "leased access" obligations; (2) Sections 621 and 622 -- franchise requirements and fees (although an open video system operator will be subject to a gross revenue fee at a rate not to exceed the franchise fee paid by the local cable operator);<sup>22</sup> (3) Section 623 -- rate regulation; and (4) Section 632 -- consumer protection and customer service. In providing for such reduced regulation, Congress again stressed its goals of flexible market entry, encouraging competition and investment, and reliance on market forces: "There are several reasons for streamlining the regulatory obligations of such systems. First, the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open systems will be 'new' entrants in established video programming markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced."<sup>23</sup>

7. Finally, Section 653 establishes a process for the resolution of any disputes that may arise.<sup>24</sup> Generally, Section 653 provides that the Commission has the authority to resolve disputes regarding open video systems, and that it must do so within 180 days of submission.<sup>25</sup> In addition, at that time or in a subsequent proceeding, the Commission may impose sanctions, including an award of carriage or damages to a person improperly denied carriage.<sup>26</sup>

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<sup>21</sup> Conference Report at 178.

<sup>22</sup> Communications Act § 653(c)(2)(B).

<sup>23</sup> Conference Report at 178.

<sup>24</sup> Communications Act § 653(a)(2).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

8. In the Report and Order issued herewith, we: (1) eliminate our rules implementing the telephone-cable cross-ownership restriction; (2) eliminate our video dialtone rules and policies; (3) terminate our proceeding that established our video dialtone rules and policies (CC Docket No. 87-266); and (4) modify our rules to the extent they relate to any requirement that a common carrier obtain a Section 214 certificate in order to establish or operate a system for the delivery of video programming. The elimination and modification of these rules were effective upon enactment of the 1996 Act, and in this Report and Order we amend these rules to conform to those statutory changes.

## **II. NOTICE OF PROPOSED RULEMAKING -- OPEN VIDEO SYSTEM REQUIREMENTS**

### **A. Carriage of Video Programming Providers**

#### **1. Statutory Provisions**

9. New subsection 653(b)(1)(A) of the Communications Act directs the Commission to prescribe regulations that, "except as required pursuant to section 611, 614, or 615, prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system . . . ." <sup>27</sup> Subsection 653(b)(1)(B) provides that, "if demand exceeds the channel capacity of the open video system," the Commission's regulations must prohibit an open video system operator and its affiliates from:

selecting the video programming services for carriage on more than one-third of the activated channel capacity on such system, but nothing in this subparagraph shall be construed to limit the number of channels that the carrier and its affiliates may offer to provide directly to subscribers. <sup>28</sup>

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<sup>27</sup> *Id.* § 653(b)(1)(A). Section 611 of the Communications Act (47 U.S.C. § 531) permits a local cable franchising authority generally to require that a cable operator designate channel capacity for public, educational, or governmental ("PEG") use, and sections 614 and 615 of the Communications Act (47 U.S.C. §§ 534, 535) set forth a cable operator's "must-carry" obligations regarding local commercial and local noncommercial educational television signals, respectively.

<sup>28</sup> *Id.* § 653(b)(1)(B). We will address the definition of "affiliate" in the Title VI context, including open video systems, in the "Cable Reform" rulemaking proceeding that will be instituted shortly.

## 2. Discussion

10. Section 653 appears to promote the dual goals of both inter-system competition (i.e., between the open video system and other multichannel video programming distributors) and intra-system competition (i.e., among video programming providers on the open video system). In so doing, it strikes a balance between providing open video system operators with substantial flexibility in the structuring of services offered over their systems, while ensuring that video programming providers that are unaffiliated with an open video system operator are able to obtain access to the systems under just and reasonable terms. Specifically, the provisions described above appear to provide: (1) that video programming providers must be treated in a non-discriminatory manner for purposes of obtaining carriage on open video systems; (2) that system capacity must be devoted to unaffiliated providers where demand for carriage exceeds the system's capacity; and (3) that although an open video system operator may select the video programming on only one-third of the activated channels where demand exceeds capacity, it may provide additional channels to subscribers as part of its programming package so long as it has not selected such additional channels for carriage.

11. In this section, we seek comment generally on the best method of implementing the statutory language in subsections 653(b)(1)(A) and (B) consistent with Congress' goals of promoting competition, investment and consumer choice. As a preliminary matter, we tentatively conclude that the prohibition against discrimination among video programming providers with respect to carriage does not require the Commission to prohibit an open video system operator's participation in the allocation of channel capacity. Therefore, we tentatively conclude that open video system operators should be permitted to administer the allocation of channel capacity, and seek comment on this tentative conclusion.

12. We next ask what regulations the Commission should adopt to ensure that the open video system operator allocates capacity on a non-discriminatory basis. One approach would be to adopt a regulation that simply prohibits an open video system operator from discriminating against unaffiliated programmers in its allocation of capacity; we would allow the open video system operator latitude to design a channel allocation policy consistent with this general rule. The Commission would rule on complaints alleging discrimination on a case-by-case basis, and, if a violation were found, could require carriage and/or award damages to any person denied carriage, or provide any other remedy available under the Communications Act.<sup>29</sup> Such an approach would provide operators with maximum business flexibility. In addition, this approach may be the most effective in encouraging telephone companies to begin providing service over open video systems. On the other hand, complete flexibility could harm programming providers and competition among multichannel video programming distributors if significant violations of the statute are permitted that cause aggrieved programming providers to incur cost and delay in vindicating their rights. We seek comment on this approach.

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<sup>29</sup> See *Id.* § 653(a)(2).

13. Alternatively, we could adopt regulations addressing specific issues that may arise in connection with the allocation of channels. This approach may provide guidance to open video system operators and programming providers about what channel allocation policies we would find to be in compliance with the statute before they make investment decisions to build, or to be a video programmer on, an open video system. However, this approach may prove to be burdensome. The remaining paragraphs in this section identify such issues and ask commenters whether we should adopt regulations to address any of these specific issues. In considering whether the Commission should adopt any specific rules concerning the allocation of capacity, we intend to weigh whether a particular approach will furnish open video system operators with the flexibility and independent business discretion permitted under the 1996 Act to compete with existing multichannel video programming distributors in the market, while implementing the 1996 Act's requirement of preserving non-discriminatory access to open video systems by video programming providers. Our goal is to try to achieve this delicate balance, while, at the same time, adopting the least regulatory approach possible.

14. Notice -- We seek comment on what procedures the Commission should adopt for an open video system operator to follow in notifying video programming providers that it intends to establish an open video system. Establishing sufficient notification procedures will be important in ensuring that video programming providers are made aware of the operator's available capacity and have a fair opportunity to obtain carriage. We seek comment, for example, on the proper form and scope of such notice, including appropriate publication or other notice requirements, the length of an adequate notice or enrollment period, and how interested video programming providers can apply for carriage. In this context, we also seek comment on the type and quantity of information regarding the system that video programming providers will need to assess their interest in carriage.

15. Operator Discretion Regarding Programming -- We also ask, in light of subsection 653(b)(1)'s general prohibition on discrimination among video programming providers, the extent to which open video system operators should have discretion regarding the identity of video programming providers entitled to carriage on its system. In this regard, we seek comment on reconciling the nondiscrimination provision with Congress' intent expressed in the legislative history that open video system operators be permitted to "tailor services to meet the unique competitive and consumer needs of individual markets."<sup>30</sup> For example, we seek comment on whether an open video system operator should be permitted to limit or preclude, in the absence of Commission regulations, the competing cable operator's ability to obtain capacity on the open video system, especially in light of Congress' intent that open video systems would introduce vigorous competition to the marketplace.<sup>31</sup>

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<sup>30</sup> Conference Report at 177.

<sup>31</sup> *Id.* at 178.

16. Capacity Measurement -- As described above, new subsection 653(b)(1)(B) provides that, "if demand exceeds the channel capacity of the open video system," the Commission's regulations must prohibit an open video system operator and its affiliates from "selecting the video programming services for carriage on more than one-third of the activated channel capacity on such system . . . ." <sup>32</sup> Thus, so long as demand does not exceed capacity (after video programming providers have been provided adequate opportunity to seek carriage), the 1996 Act does not set any limits on the amount of programming that the open video system operator or its affiliates may select.

17. *Analog/Digital:* We also note that measuring the "capacity" of an open video system may not be entirely clear in all cases. For instance, defining digital capacity based on the number of "channels" carried on an open video system may not be workable because various programming services will require various amounts of bandwidth, depending on the type of information to be delivered. Therefore, we seek comment on how we should measure activated channel capacity. For example, would it be appropriate to measure capacity: (1) based solely on the system's total bandwidth; or (2) based on the number of channels for the system's analog portion, and on the bandwidth for the system's digital portion?

18. *Switched Digital:* Similarly, we seek comment on how capacity should be measured on open video systems employing "switched digital" video technology on such systems. An operator can use switching to send a data stream of only the information sought by the consumer, rather than a continuous data stream of all available signals, enabling operators to "expand" capacity on an almost unlimited basis. We believe that, for purposes of Section 653, the capacity of such systems can be presumed to be unlimited, and seek comment on this tentative conclusion.

19. *Impact of PEG and Must-Carry Obligations:* The 1996 Act provides that PEG and "must-carry" obligations apply to open video system operators, regardless of the status of carriage demand and available capacity. <sup>33</sup> Where carriage demand exceeds capacity, we tentatively conclude that such obligations should not be counted against the one-third of capacity that an open video system operator or its affiliate may select. <sup>34</sup> Neither an open

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<sup>32</sup> Communications Act § 653(b)(1)(B).

<sup>33</sup> *Id.* § 653(c)(1)(B). See Section II(F), below. Under the Communications Act's PEG provisions, a franchising authority may require as part of a local cable franchise, or as part of a cable operator's proposal for a franchise renewal, that channel capacity be designated for PEG use, and that capacity be designated on institutional networks for educational or governmental use. *Id.* § 611(b), 47 U.S.C. § 531(b).

<sup>34</sup> For example, if there are 90 channels on an open video system, 15 of which are devoted to PEG and must-carry requirements, the open video system operator would be entitled to select the programming on one-third of the remaining 75 channels -- i.e., 25

video system operator nor its affiliate would be "selecting" such programming because, as a legal and practical matter, their PEG and must-carry obligations are established as a matter of law or through negotiations with local franchising authorities. We seek comment on these tentative conclusions.

20. Minimum/Maximum Capacity Limits -- We also seek comment on whether the Commission can and should permit open video system operators to prescribe either minimum or maximum amounts of capacity that an unaffiliated programming provider may obtain, regardless of the provider's identity or the content of its programming. For example, we seek comment on whether, where only the open video system operator or its affiliate and one other unaffiliated video programming provider seek carriage on the system, Congress intended to restrict the operator to selecting the programming on only one-third of the system's capacity, while the unaffiliated provider could select the remaining two-thirds. In addition, we seek comment on how the allowance of channel sharing in Section 653(b)(1)(C) relates to Section 653(b)(1)(A)'s non-discrimination requirements.<sup>35</sup>

21. Analog/Digital Channel Allocation -- We also seek comment on whether the allocation of specific types of channel capacity among video programming providers can constitute impermissible discrimination under the statute. If so, we seek comment on how the Commission should address the issue. For instance, so long as excess capacity is available, should an open video system operator be permitted to use all of the system's analog channels for it or its affiliate's use, or reserve the analog capacity for a single unaffiliated video programming provider, and require all other video programming providers to use the digital capacity (even those that requested only analog capacity)? We seek additional information on the current status and availability of digital capacity, including the type and cost of additional equipment subscribers may need to receive digital signals, and whether there are any other reasons, such as quality or functionality, to differentiate between analog and digital channels. In light of these considerations, we ask whether it would be appropriate to treat analog and digital capacity separately for purposes of allocating capacity or the right to select video programming on open video systems.

22. Channel Positioning -- Beyond the analog/digital distinction, we seek comment on whether "channel positioning" decisions need to be evaluated under the anti-discrimination provisions of the statute. For instance, even within the analog capacity, we seek comment on whether it would be discriminatory for the open video system operator to assign to itself or its affiliate the lower numbered channels -- which may be considered more "attractive" (from a marketing standpoint or more accessible from a consumer's standpoint) and will likely contain the over-the-air broadcast channels -- on which its or its affiliate's selected programming would be carried. If so, are there technical solutions, such as channel "re-mapping," that

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channels.

<sup>35</sup> Channel sharing is discussed at length in Section C. below.

would ameliorate the problem?

23. Technical Issues -- We also seek comment on whether certain technical requirements, such as the programming format (e.g., digital or analog, modulation, NTSC, baseband, or MPEG), interference requirements or signal quality, could limit or restrict video programming providers' access to open video systems. In addition, we anticipate that operators may deploy a variety of compression techniques in their open video systems, and seek comment on the possible impact of these various techniques on video programming providers' non-discriminatory access to the platform. If certain technical requirements could unduly restrict programming provider access, we seek comment on whether the Commission should adopt any regulations or standards to promote such access.

24. Allocation Procedures Where Demand Exceeds Capacity -- In addition, where carriage demand exceeds capacity, we seek comment on whether the Commission should design procedures to allocate the two-thirds of channel capacity that must be selected by unaffiliated video programming providers, or whether the method of allocating capacity in this situation should be left to the discretion of the open video system operator, subject to the statute's requirement that it can only select the programming on one-third of the activated channels. With respect to the latter approach, we seek comment on how we could provide such flexibility while guarding against impermissible discrimination. One possibility is that the Commission could establish a range of acceptable options for the allocation of capacity. We offer three possible approaches for consideration: first-come first-served, lottery and proportional allotment.<sup>36</sup> We also invite commenters to suggest additional options. We ask that commenters address how their methods would advance Congress' goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology and increased consumer choice.

25. Changes in Demand/Capacity -- The situation also may arise in which system capacity exceeds demand for carriage after the initial allocation process, but additional demand subsequently causes the system's capacity to be exceeded. We note that requiring the relinquishment of a provider's allotment of channels after it has made business plans and has begun providing service to customers is detrimental to the provider's business and disrupts service. Therefore, there is a strong public interest in establishing some level of certainty in providers' expectations with respect to their ability to retain channel capacity once allocated, and in consumers' expectations of uninterrupted service. On the other hand, where demand exceeds capacity, the 1996 Act clearly limits the amount of capacity on which an open video system operator may select programming. We seek comment on how this situation should be addressed. One approach would be not to require an open video system operator to relinquish

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<sup>36</sup> Under the proportional allotment approach, an unaffiliated video programming provider that applied for channel capacity during the enrollment period would receive an amount of capacity on which it could select the programming based on the proportion of its request to the total amount of requested capacity.

any capacity immediately, but to permit the operator to hold periodic enrollment periods -- e.g., every one, three or five years -- during which new programming providers could request capacity on the system and such rights could be reallocated. We believe that such an approach could benefit system operators by providing them with a reasonable "planning horizon" during which they could assure themselves and their subscribers of a stable programming package. This approach, however, could disrupt programming providers' services to their customers, create market uncertainty, and deny competing video programming providers access to the system until the next enrollment period. We seek comment on this approach and the appropriate length of time between enrollment periods. We also seek comment on other possible approaches.

26. We also seek comment on how to address the situation in which additional capacity becomes available on the open video system, whether as the result of a system upgrade or otherwise. Should the operator be required to conduct a new enrollment period for the additional capacity, or should the capacity be allocated in some other way?

27. Operator's Ability to Market Channels It Did Not Select -- Finally, while subsection 653(b)(1)(B) limits the number of programming services that an open video system operator or its affiliate may select where carriage demand exceeds capacity, it also states that nothing in this provision shall be construed as limiting "the number of channels that the carrier and its affiliates may offer to provide directly to subscribers."<sup>37</sup> We tentatively conclude that this provision merely allows an open video system operator and its affiliates to enter into agreements to market to subscribers the programming services selected for carriage by unaffiliated video programming providers. We believe that this provision clarifies that the operator or its affiliate should be permitted to market to subscribers a service package consisting of the programming it selects on its one-third of system capacity and programming selected by other, unaffiliated video programming providers. We believe that public interest benefits could result from efficiencies and innovations under this approach, including enhancing both system operators' flexibility and the ability of unaffiliated programmers to compete in video programming markets offering consumers more programming options. We seek comment on this approach and these tentative conclusions.

## **B. Rates, Terms and Conditions of Carriage**

### **1. Statutory Provisions**

28. New subsection 653(b)(1)(A) requires the Commission to prescribe regulations that will "ensure that the rates, terms, and conditions" for the carriage of video programming on an open video system "are just and reasonable and are not unjustly or unreasonably discriminatory."

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<sup>37</sup> Communications Act § 653(b)(1)(B).

## 2. Discussion

29. We seek comment on how to implement this provision, especially in light of the following: (1) Congress specifically provided that open video system operators shall not be regulated as common carriers;<sup>38</sup> (2) open video system operators generally will be "new" entrants in established video programming distribution markets, lacking in market power vis-a-vis video programming end users and subject to competition from the incumbent cable operator;<sup>39</sup> (3) when a telephone company affiliate that is an open video system operator enters a market, the incumbent cable operator will probably no longer face rate regulation;<sup>40</sup> and (4) the Commission will have only a limited period of time (10 days) to review requests for open video system certification.<sup>41</sup>

30. In establishing a standard that rates be just, reasonable and not unjustly or unreasonably discriminatory, we believe that Congress is expressing its desire that unaffiliated video programmers obtain fair access to the open video system platform. Inherent in this provision, however, is also the notion that the platform provider have the opportunity to receive reasonable compensation for the use of its facilities. Given that an open video system is not a common carrier system, traditional pricing mechanisms in the common carrier and public utility context would not appear to be appropriate to use in implementing this subsection of the open video system provisions. We seek comment on how we should apply this provision -- given the legislative history and Congress' repeal of our video dialtone rules -- in light of the fact that the language Congress used is similar to the language of Title II.<sup>42</sup>

31. As with other subsections of the open video system provisions, providing the operator flexibility to establish pricing mechanisms in the first instance may be the best way to encourage entry into the video marketplace through an open video system. Such an approach also recognizes that there may be a number of viable options that would be consistent with the provisions of the 1996 Act concerning nondiscrimination and

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<sup>38</sup> *Id.* § 653(c)(3); *see also* Conference Report at 178 ("The conferees do not intend that the Commission impose title II-like regulation under the authority of this section.").

<sup>39</sup> Conference Report at 178.

<sup>40</sup> *See* 1996 Act § 301(b)(3) (amending the definition of "effective competition" under Section 623(l)(1) of the Communications Act to include the situation in which a local exchange carrier or its affiliate offers comparable video programming directly to subscribers within an unaffiliated cable operator's service area).

<sup>41</sup> Communications Act § 653(a)(1).

<sup>42</sup> *See* Communications Act, § 201 (requiring "just and reasonable" charges, practices, classifications and regulations); § 202 (prohibiting "unjust or unreasonable discrimination" in charges, practices, classifications, regulations, facilities or services).

reasonableness of rates. We therefore ask for comment on whether market incentives and the need to compete with an incumbent cable operator will ensure that negotiated carriage rates are just and reasonable. We also seek comment on an appropriate process for resolving disputes under such an approach, including whether the Commission should issue guidelines setting forth the factors upon which it will base a "just and reasonable" determination (e.g., the carriage rates for similar systems, the number of programming providers that have obtained carriage). Another market-based approach on which we seek comment would establish a presumption that an operator's carriage rates are reasonable if some minimum number of programming providers pay the rates, or if some minimum amount of capacity is taken by unaffiliated programming providers at those rates. Alternatively, we seek comment on whether the Commission should adopt a specific framework for ensuring that carriage rates are "just and reasonable" that would give the open video system operator and programming providers certainty that the rates are reasonable. For example, we could adopt a formula for open video system operators to apply in setting rates for video programmers using an open video system. Under each of these approaches, we seek comment on whether an open video system operator should be required to charge rates that are no greater than the rates it charges its affiliated programmers.

32. Regarding the requirement that rates, terms and conditions of carriage not be "unjustly or unreasonably discriminatory," we tentatively conclude that Congress intended that some level of rate "discrimination" would be acceptable, provided that the justification for the discrimination was not unjust or unreasonable. We seek comment on this tentative conclusion. We also seek comment on what justifications would be sufficient to make any discrimination under this subsection just and reasonable. Possible sources of justification include differences in the cost of providing service to the video programmer, differences in the type of service offered by the video programmer, and differences in the way in which the video programmer receives compensation from end users. We seek comment on whether open video system operators should be permitted to charge different carriage rates to different categories of video programmers -- e.g., not-for-profit programmers, home shopping programmers, or pay-per-channel or pay-per-program programmers.

33. We further seek comment on what other "terms and conditions" of carriage must be "just and reasonable, and . . . not unjustly or unreasonably discriminatory" under this provision, such as whether video programming providers may be required to "share" channels (*see* Section II.C., below).

34. Finally, commenters should indicate what legal standard the Commission should adopt in evaluating claims of unjust or unreasonable discrimination under this subsection. In order to ensure that video programming providers may seek recourse if they believe they are being harmed by rates, terms or conditions that do not comply with the 1996 Act, we also tentatively conclude that an open video system operator should be required to make its contracts with all video programming providers publicly available, which will disclose the rates charged to programming providers and other terms and conditions of carriage. We seek comment on this proposal, and ask commenters to suggest any other methods, particularly

market-based methods, for ensuring that rates are not unjustly or unreasonably discriminatory.

## **C. Channel Sharing**

### **1. Statutory Provisions**

35. New subsection 653(b)(1)(C) of the Communications Act requires the Commission to prescribe regulations that permit an open video system operator "to carry on only one channel any video programming service that is offered by more than one video programming provider (including the local exchange carrier's video programming affiliate), provided that subscribers have ready and immediate access to any such video programming service."<sup>43</sup> The Conference Report states that this provision was intended "to permit an open video system operator to require channel sharing."<sup>44</sup>

### **2. Discussion**

36. Channel sharing is one means of increasing the availability of channel capacity because sharing would allow two or more programming providers that seek to offer the same video programming service to share the channel on which that channel is carried. For example, each of three programming providers on a single open video system might wish to include the same five programming services in its program package. Without channel sharing, 15 channels would have to be devoted to these programming services; with channel sharing, only five channels would be needed and the other 10 channels could be made available for other programming. Permitting channel sharing arrangements thus can provide efficiencies to video programming providers and open video system operators, and could increase programming diversity for consumers.

37. The question of whether channel sharing should be required is left to the discretion of open video system operators. In this regard, we tentatively conclude that the 1996 Act requires the Commission, at a minimum, to permit an open video system operator to choose how and which programming will be selected for shared channels. We also tentatively conclude that, if the open video system operator chooses not to participate in the administration of channel sharing arrangements, it should be allowed to select another entity to do so. We seek comment on these tentative conclusions.

38. In addition, we seek comment on whether, legally, a system operator has not "selected" video programming as that term is used in new subsection 653(b)(1)(B) of the Communications Act,<sup>45</sup> if: (1) it shares the channels regardless of who is administering the

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<sup>43</sup> *Id.* § 653(b)(1)(C).

<sup>44</sup> Conference Report at 177.

<sup>45</sup> Communications Act § 653(b)(1)(B).

channel sharing arrangements, or (2) it delegates to an independent entity the right to choose which, if any, channels will be shared, and to administer the actual channel sharing arrangements. If the operator would not be "selecting" the channels in these instances, then the shared channels would not be counted against the maximum one-third of activated channel capacity that the open video system operator is permitted to select itself, where demand for carriage exceeds capacity of the system.

39. Second, we seek comment on whether the Commission should prescribe any terms and conditions under which channels will be shared, and whether channel sharing is subject to the non-discrimination requirements of subsection 653(b)(1)(A). If channel sharing is subject to that subsection, we seek comment on whether the Commission should adopt any specific rules to prohibit an open video system operator from requiring channel sharing in certain situations. In this context, we seek comment on whether any differences exist between the technical capability of shared and non-shared channels to carry programming, or in terms of attractiveness to consumers, that would make non-shared channels more attractive to video programming providers. For example, would it be discriminatory to require a video programmer using only digital capacity to share an analog channel, or *vice versa*?

40. Third, we seek comment on how to ensure that subscribers have "ready and immediate access" to the shared channels. Does this mean that the fact that a channel is shared must appear transparent to subscribers, such that an open video system operator would have to deliver the shared channel as an integrated part of the subscriber's program-package? We seek comment on the technical feasibility of this approach if the channel is located on a portion of bandwidth far removed from the subscriber's package. For example, would a subscriber of analog services have "ready and immediate access" to a shared channel that an open video system operator carried on its digital capacity, and *vice versa*?

41. Nothing undertaken in this NPRM should be construed to alter or dilute the rights of programming producers, vendors, and other entities responsible for programming content to exercise control over their products. Program vendors and licensors remain free to license or not to license their programming for shared use by multiple video programming providers. We tentatively conclude that each video provider that wants to provide a program service to subscribers that will be carried on a shared channel must first obtain permission from the program service to do so.

#### **D. Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity**

##### **1. *Statutory and Rule Provisions***

42. The 1996 Act directs the Commission to prescribe regulations that "extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67), network non-duplication (47 C.F.R. 76.92 et

seq.), and syndicated exclusivity (47 C.F.R. 76.151 et seq.)."<sup>46</sup> All of these statutory provisions concern exclusive rights to programming in certain geographic areas.

43. Our sports exclusivity rules provide that a cable system located within 35 miles of the city of license of a broadcast station where a sporting event is taking place may not carry the live television broadcast of the sporting event on its system if the event is not available live on a local television broadcast station, if the holder of the broadcast rights to the event requests such a blackout.<sup>47</sup>

44. The network non-duplication rules provide that commercial television station licensees are entitled to protect the network programming they have contracted for by exercising non-duplication rights against more distant television broadcast stations that provide substantially identical programming and that are carried on a local cable television system. A network program can be any program that is delivered simultaneously to more than one broadcast station, and does not necessarily mean only programming distributed by one of the major national broadcast networks.<sup>48</sup> Commercial broadcast stations may assert these non-duplication rights regardless of whether or not their signals are being transmitted by the local cable system.<sup>49</sup> The cable operator is required to delete the duplicate programming if it is subject to this provision. This provision is intended to preserve the value of programmers' product, in order to maintain their ability to deliver diverse programming to consumers.

45. The objectives and procedures of the syndicated exclusivity rules are similar to those of the network non-duplication rules, except these rules concern syndicated programming, which includes any program other than network programming. Under the syndicated exclusivity provisions, cable systems may be required, upon proper notification, to provide protection to broadcasters that have contracted with program suppliers for exclusive exhibition rights to certain programs within specific geographic areas, whether or not the cable system affected is carrying the station requesting this protection. However, no cable system is required to delete a program broadcast by a station which is either significantly viewed or which places a Grade B or better contour over the community of the cable system.<sup>50</sup> In situations concerning sports exclusivity, network non-duplication, and syndicated exclusivity, the licensee typically must notify the local cable operator of its desire to invoke the particular right.

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<sup>46</sup> *Id.* § 653(b)(1)(D).

<sup>47</sup> *See generally* 47 C.F.R. § 76.67.

<sup>48</sup> 47 C.F.R. § 76.5(m).

<sup>49</sup> *See generally* 47 C.F.R. §§ 76.92-97.

<sup>50</sup> *See generally* 47 C.F.R. §§ 76.151, .153-.159, .163.

## **2. Discussion**

46. We seek comment on how these provisions can be implemented in the open video system context. First, we seek comment on how these provisions (i.e., sports exclusivity, network non-duplication, and syndicated exclusivity) would be applied to an open video system whose service territory cross multiple community units or relevant geographic zones. Second, we seek comment on what entity in the open video system context would be responsible for enforcing these rights or be able to block programming -- an open video system operator, the individual video programming providers, or some other entity? Finally, we note that certain channels on open video systems, including those distributing network affiliates, likely will be shared among two or more video programming providers on the system. We seek comment on implementing this provision with respect to such shared channels. In particular, we seek comment on what entity would have the ability to require that certain programming be blocked (e.g., one of the video providers sharing the channel, the system operator), and what entity would be responsible for doing so.

### **E. Information Provided to Subscribers**

#### **1. Statutory Provisions**

47. The 1996 Act directs the Commission to prescribe regulations that prohibit an open video system operator "from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers."<sup>51</sup> In addition, the Commission must establish regulations that require an open video system operator to ensure that video programming providers or copyright holders (or both) are able "suitably and uniquely to identify their programming services to subscribers," and, further, that an open video system operator will not change or alter any such identification that is transmitted as part of the programming signal.<sup>52</sup> Finally, the 1996 Act directs that the Commission prescribe regulations that prohibit an open video system operator from "omitting television broadcast stations or other unaffiliated video programming services carried on such system from any navigational device, guide or menu."<sup>53</sup>

#### **2. Discussion**

48. We seek comment on how to interpret and implement the various provisions of subsection 653(b)(1)(E), which seek to prevent discrimination in favor of an open video

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<sup>51</sup> Communications Act § 653(b)(1)(E)(i).

<sup>52</sup> *Id.* § 653(b)(1)(E)(ii) and (iii).

<sup>53</sup> *Id.* § 653(b)(1)(E)(iv).

system operator or its affiliates with regard to the information (or the way information) is provided to subscribers for selecting programming on open video systems. Although this subsection is unclear, and the legislative history provides little guidance, we believe that this section is intended to be a specific application of the non-discrimination requirement contained in subsection (A). We believe that the provisions are meant to ensure that an open video system operator does not provide itself or its affiliates with a marketing advantage *vis a vis* other video programming providers on the open video system in the way it markets its affiliated programming or interfaces with the customer in describing program selections. In particular, we seek comment on what, in addition to advertising, qualifies under subsection 653(b)(1)(E)(i) as "material or information" provided by the operator to subscribers for program selection purposes. Does this term include, *e.g.*, program guides (electronic or paper) and billing inserts?

49. In addition, we seek comment on the meaning of the term "selecting programming" in that subsection. Broadly read, subsection 653(b)(1)(E)(i) could operate as an impediment to an open video system operator's advertising of its affiliated programming service, since any such advertising presumably would be intended to encourage subscribers to "select" its affiliated video programming service. However, we do not believe Congress intended this provision to hinder advertising by an open video system operator of its affiliated programming service. We seek comment on whether this subsection should apply when the open video system operator is the only entity that deals directly with end user customers on matters such as billing, customer service and marketing, or whether the provision requires that the operator not unreasonably discriminate in it or its affiliate's favor in all instances in which it provides "material or information" to subscribers. In addition, we seek comment on the relationship between subsection 653(b)(1)(E)(i)'s non-discrimination requirement and subsection 653(b)(1)(E)(iv), which prohibits an open video system operator from omitting television broadcast stations or other unaffiliated programming from any "navigational device, guide or menu." We further seek comment on whether subsection 653(b)(1)(E) should be interpreted to prohibit advertising by the open video system operator on shared channels.

50. We also seek specific comment on whether subsection 653(b)(1)(E)(iv)'s prohibition against omitting broadcast stations and unaffiliated programmers from any "navigational device, guide or menu" applies to programmers that are not part of the subscriber's package.<sup>54</sup> For example, does subsection 653(b)(1)(E)(iv) require that an open video system operator include every video programming service that is available on the open video system on every menu, even if a particular subscriber does not subscribe to every programming service available on the open video system? We seek comment on what the terms "navigational device, guide or menu" should mean.

51. Finally, we seek comment on what would constitute "suitable and unique"

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<sup>54</sup> We expect that the term "navigational device" will also be addressed in a separate proceeding as that term is used in new Section 629 of the Communications Act.

identification under subsections 653(b)(1)(E)(ii) and 653(b)(1)(E)(iii), and the meaning and scope of these sections.

## **F. Applicability of Certain Title VI Provisions**

### **1. Statutory Requirements**

#### *a. PEG, Must-Carry, and Retransmission Consent*

52. New subsection 653(c)(1)(B) of the Communications Act provides that any provision that applies to cable operators under Sections 611, 614 and 615, and Section 325 of title III, "shall apply in accordance with the regulations prescribed under paragraph (2),"<sup>55</sup> and "to any operator of an open video system for which the Commission has approved a certification under this section."<sup>56</sup> Paragraph (2) provides that the "Commission shall, to the extent possible, impose obligations that are no greater or lesser than the obligations contained in the provisions described in paragraph (1)(B) of this subsection."<sup>57</sup> However, paragraph (1)(C) also establishes, among other things, that open video system operators are not subject to the cable franchising requirements.<sup>58</sup>

53. Generally, Section 611 of the Communications Act permits a local cable franchising authority to require that a cable operator designate channel capacity for public, educational, and governmental access.<sup>59</sup> Under the statutory provisions governing PEG access channels, a franchising authority may require as part of a local cable franchise, or as part of a cable operator's proposal for a franchise renewal, that channel capacity be designated for PEG use, and that capacity on institutional networks can be designated for educational or governmental use.<sup>60</sup> The franchising authority is allowed to mandate and enforce franchise requirements for services, facilities, or equipment related to PEG use of channel capacity.<sup>61</sup> The franchising authority must permit the cable operator to use excess channel capacity

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<sup>55</sup> *Id.* § 653(c)(1)(B).

<sup>56</sup> *Id.* § 653(c)(1).

<sup>57</sup> *Id.* § 653(c)(2)(A).

<sup>58</sup> *Id.* § 653(c)(1)(C).

<sup>59</sup> 47 U.S.C. § 531.

<sup>60</sup> Communications Act § 611(b), 47 U.S.C. § 531(b).

<sup>61</sup> *Id.* § 611(c), 47 U.S.C. § 531(c).

designated for PEG use when such capacity is not being used for such purposes.<sup>62</sup> Finally, the cable operator is not permitted to exercise any editorial control over PEG channels being operated under the franchising authority's control.<sup>63</sup>

54. Sections 614 and 615 of the Communications Act set forth a cable operator's "must-carry" obligations regarding local commercial and local noncommercial educational television signals, respectively.<sup>64</sup> Cable operators are required to set aside a portion of their capacity for carriage of such local broadcast stations. Section 325 of the Communications Act sets forth a cable operator's retransmission consent obligations, generally prohibiting cable operators and other multichannel video programming distributors from carrying commercial broadcast stations without obtaining the station's consent.<sup>65</sup> Local commercial stations may choose whether to proceed under the must-carry or retransmission consent requirements.<sup>66</sup> Under must-carry, a station is entitled to insist on carriage in its local market area.<sup>67</sup> Under retransmission consent, the station and the carrier negotiate the terms of a carriage arrangement and the station is permitted to receive compensation in return for carriage.<sup>68</sup> In addition, cable operators are entitled to carry non-local commercial stations pursuant to a retransmission consent agreement.<sup>69</sup>

b. *Program Access*

55. New subsection 653(c)(1)(A) of the 1996 Act provides that, *inter alia*, the Commission's rules governing the development of competition and diversity in video programming distribution ("program access")<sup>70</sup> in the cable television context shall apply to any operator of an open video system.<sup>71</sup> Moreover, the 1996 Act amends Section 628 of the

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<sup>62</sup> *Id.* § 611(d)(1), 47 U.S.C. § 531(d)(1).

<sup>63</sup> *Id.* § 611(e), 47 U.S.C. § 531(e).

<sup>64</sup> Communications Act §§ 614, 615, 47 U.S.C. §§ 534, 535.

<sup>65</sup> Communications Act § 325, 47 U.S.C. § 325.

<sup>66</sup> 47 U.S.C. § 325(b)(3)(B).

<sup>67</sup> Communications Act §§ 614(a), 615(a), 47 U.S.C. §§ 534(a), 535(a).

<sup>68</sup> Communications Act § 325, 47 U.S.C. § 325.

<sup>69</sup> *Id.*

<sup>70</sup> *See* Communications Act § 628, 47 U.S.C. § 548.

<sup>71</sup> *Id.* § 653(c)(1)(A).

Communications Act governing program access to apply the provisions under that section to a common carrier or its affiliate that provides video programming by any means directly to subscribers.<sup>72</sup> Generally, the program access rules prohibit a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, from engaging in unfair methods of competition or unfair or deceptive practices, with respect to the prices, terms, and conditions of sale of programming, in order to hinder significantly or prevent any multichannel video programming distributor from providing cable, satellite or satellite broadcast programming to consumers. The rules also provide procedures for resolving disputes in this area. The rules require that complaints of discrimination must involve discrimination between "competing distributors." To be considered a competing distributor, the rules require that there be some overlap in actual or proposed service areas, and the geographic area for assessing whether distributors compete with each other can be local, regional or national, depending on how the distributor buys and distributes programming.<sup>73</sup>

c. *Other Title VI Provisions*

56. Subsection 653(c)(1)(A) also provides that the following Title VI provisions apply to the operator of an open video system: (1) Section 613 (except for subsection (a)) (ownership restrictions); (2) Section 616 (regulation of carriage agreements); (3) Section 623(f) (negative option billing); (4) Section 631 (subscriber privacy); and (5) Section 634 (equal employment opportunity).

2. *Discussion*

a. *PEG, Must-Carry, and Retransmission Consent*

57. We seek comment on implementing the 1996 Act's provision applying PEG obligations to open video system operators; in particular, on how PEG obligations should be established in the absence of a franchise requirement. In light of the statute's direction that

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<sup>72</sup> 1996 Act § 301(h). New subsection (j) of Section 628 of the Communications Act of 1934 provides:

(j) COMMON CARRIERS. -- Any provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this subsection, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company).

<sup>73</sup> See generally 47 C.F.R. §§ 76.1000-76.1003

we should impose PEG obligations on open video system operators that are no greater or lesser than those imposed on cable operators, we seek comment on whether an open video system operator should be required to duplicate the PEG obligations of the incumbent cable operator, either directly, by interconnecting with the cable operator's PEG channel feeds, or otherwise sharing with the cable operator the capital and operating expenses related to PEG channels.<sup>74</sup> Where there is no incumbent cable operator, we seek comment on how PEG requirements should be established (e.g., a percentage of activated channel capacity or some other method). Further, if an open video system operator's PEG obligations track those of the incumbent cable operator, we seek comment on whether its obligations would be subject to change if the cable operator and franchising authority negotiate new PEG obligations pursuant to a cable franchise renewal. In addition, we seek comment on whether and how the open video system operator should be required to provide the PEG channels to all subscribers, including those subscribers that do not subscribe to the operator's, or its affiliate's, programming service.

58. With respect to technical considerations, we seek comment regarding the treatment of situations where an open video system overlaps several cable franchise jurisdictions, or perhaps covers most of some franchise areas, but only a very small part of others. For example, we seek comment on whether technical and cost constraints make it difficult or burdensome to deliver PEG channels only to certain areas within the open video system service territory. In addition, we solicit comment, in particular from local exchange carriers and franchising authorities, on any equipment that is specific to open video systems that local franchising authorities may need to have their programming delivered over open video systems. In addressing this issue, we also solicit comment on how cable operators today comply with different PEG requirements when a cable system spans more than one franchise area.

59. We seek comment on the overall applicability of must-carry and retransmission consent in the context of open video systems.<sup>75</sup> Generally, we ask whether and how technological and administrative differences between an open video system and a traditional cable television system affect the implementation of the must-carry and retransmission consent provisions. In the open video system context, where there can be multiple programming providers, we ask whether and how open video system operators should ensure that every subscriber can receive the must-carry channels. For example, if a subscriber purchases a programming package that is not affiliated with the operator, is the operator still responsible for ensuring that the subscriber receives the must-carry channels? If so, how would that be

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<sup>74</sup> In this context, we note that our proposal does not count the channel capacity an open video system operator must devote to PEG access channels against the maximum one-third of capacity for which the operator may select the programming, where demand for carriage on the system exceeds the system's capacity. See *infra* Section II.A.

<sup>75</sup> See 47 C.F.R. §§ 76.51-.64.

accomplished? For instance, can and should the Commission require that the unaffiliated programming provider include the must-carry channels as part of its package? Can and should the Commission require that all subscribers purchase a package of must-carry and PEG channels akin to a cable system's "basic tier"? Or is there some other way to apply must-carry obligations in this situation?

60. With respect to fulfilling must-carry obligations, we seek comment regarding how must-carry and retransmission consent stations should be defined for open video system systems that span multiple television markets. In addition, we seek comment regarding the number of must-carry and retransmission consent stations (including low power station carriage obligations) that must be available on an open video system, and the overall applicability of the statutory channel positioning and signal availability provisions. In this regard, we note that the statutory provision requires that, to the extent possible, obligations that are imposed on open video system operators should be no greater or lesser than the obligations imposed on cable operators.<sup>76</sup> We also ask how must-carry and PEG obligations would apply to technologies not capable of carrying live broadcasts (e.g., Asymmetrical Digital Subscriber Line, which can be used to deliver limited compressed digital video-on-demand through single twisted pair wire). In this context, we seek comment on how cable operators today comply with different must-carry and retransmission requirements when a cable system spans more than one Area of Dominant Influence or other relevant region, as this information may be relevant.

b. *Program Access*

61. As described above, the program access rules generally prohibit a cable operator from unfairly hindering other multichannel video programming distributors from obtaining the right to carry satellite programming services in which the operator has an attributable interest. We seek comment on applying the program access rules to open video system operators, as required under the 1996 Act. In particular, we ask for comment on whether and how our program access rules would apply in the channel sharing context.

c. *Other Title VI Provisions*

62. We propose to amend our rules to apply Sections 613 (except for subsection (a)), 616, 623(f), 631 and 634 to open video system operators, as required by new subsection 653(c)(1)(A) of the Communications Act. We seek comment on any issues raised by the application of these sections to open video system operators.

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<sup>76</sup> See Communications Act § 653(c)(2)(A).